

ROBBINS ARROYO LLP  
BRIAN J. ROBBINS (190264)  
KEVIN A. SEELY (199982)  
ASHLEY R. RIFKIN (246602)  
STEVEN M. MCKANY (271405)  
600 B Street, Suite 1900  
San Diego, CA 92101  
Telephone: (619) 525-3990  
Facsimile: (619) 525-3991  
E-mail: brobbins@robbinsarroyo.com  
kseely@robbinsarroyo.com  
arifkin@robbinsarroyo.com  
smckany@robbinsarroyo.com

LOCKRIDGE GRINDAL NAUEN P.L.L.P.  
REBECCA A. PETERSON (241858)  
ROBERT K. SHELQUIST(*pro hac vice*)  
100 Washington Avenue South, Suite 2200  
Minneapolis, MN 55401  
Telephone: (612) 339-6900  
Facsimile: (612) 339-0981  
E-mail: rapeterson@locklaw.com  
rkshelquist@locklaw.com

Attorneys for Plaintiffs

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DANIEL ZEIGER and DANZ DOGGIE	)	Case No. 3:17-cv-04056-WHO
DAYTRIPS, Individually and on Behalf of All	)	
Others Similarly Situated,	)	<u>CLASS ACTION</u>
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION FOR
v.	)	VOLUNTARY DISMISSAL WITHOUT
	)	PREJUDICE AND WITHOUT NOTICE
WELLPET LLC, a Delaware corporation,	)	AS TO PLAINTIFF DANZ DOGGIE
	)	DAYTRIPS; MEMORANDUM OF
Defendant.	)	POINTS AND AUTHORITIES
	)	
	)	Judge: Hon. William H. Orrick
	)	Hearing Date: December 5, 2018
	)	Hearing Time: 2:00 p.m.
	)	Ctrm: 2, 17th Floor

PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AND  
WITHOUT NOTICE AS TO PLAINTIFF DANZ DOGGIE DAYTRIPS

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE THAT on December 5, 2018, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 2, 17th Floor, of the U.S. District Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, plaintiffs Daniel Zeiger ("Zeiger") and Danz Doggie Daytrips ("Danz") will and hereby do move the Court for an order voluntarily dismissing plaintiff Danz as a party from the above-captioned action, without prejudice and without notice, pursuant to Rules 23.1 and 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiff Zeiger will continue to be the named plaintiff in this action.

Rule 41 provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

This motion is based on this Notice of Motion, the below Memorandum of Points and Authorities, the declaration of Steven M. McKany, the pleadings and documents on file in this case, and such other evidence as may be presented at or before the hearing on this motion.

Dated: October 24, 2018

Respectfully submitted,

/s/ Steven M. McKany  
STEVEN M. McKany

ROBBINS ARROYO LLP  
BRIAN J. ROBBINS  
KEVIN A. SEELY  
ASHLEY R. RIFKIN  
STEVEN M. MCKANY  
600 B Street, Suite 1900  
San Diego, CA 92101  
Telephone: (619) 525-3990  
Facsimile: (619) 525-3991  
E-mail: brobbins@robbinsarroyo.com  
kseely@robbinsarroyo.com  
arifkin@robbinsarroyo.com  
smckany@robbinsarroyo.com

LOCKRIDGE GRINDAL NAUEN P.L.L.P.  
ROBERT K. SHELQUIST  
REBECCA A. PETERSON  
100 Washington Avenue South, Suite 2200  
Minneapolis, MN 55401  
Telephone: (612) 339-6900  
Facsimile: (612) 339-0981  
E-mail: rkshelquist@locklaw.com  
rapeterson@locklaw.com

1 GUSTAFSON GLUEK, PLLC  
2 DANIEL E. GUSTAFSON (*Pro Hac Vice*)  
3 KARLA M. GLUEK (*Pro Hac Vice*)  
4 DANIEL J. NORDIN (*Pro Hac Vice*)  
5 Canadian Pacific Plaza  
6 120 South 6<sup>th</sup> Street, Suite 2600  
7 Minneapolis, MN 55402  
8 Telephone: (612) 333-8844  
9 Facsimile: (612) 339-6622  
10 E-mail: dgustafson@gustafsongluek.com  
11 kgluek@gustafsongluek.com  
12 dnordin@gustafsongluek.com  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Attorneys for Plaintiffs*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**ISSUE TO BE DECIDED**

Plaintiffs Daniel Zeiger ("Zeiger") and Danz Doggie Daytrips ("Danz" and together "Plaintiffs") hereby move the Court for an order voluntarily dismissing plaintiff Danz as a party from the above-captioned action, without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure ("Rule 41"). Plaintiff Zeiger will continue as a named plaintiff in this action.

**STATEMENT OF RELEVANT FACTS**

This action concerns certain of Defendant's dry dog food sold under the Wellness brand name that it packages, labels, markets, and advertises with representations that are intended to, and do, convey to consumers that the products possess certain qualities and characteristics that justify a premium price. ¶¶1-2, 36-45.<sup>1</sup> As detailed in the SAC, Defendant knew or should have known that the alleged premium products were not as represented because they contain undisclosed lead, arsenic, mercury, and bisphenol A, the presence of which are material to a reasonable consumer when making purchasing decisions. ¶¶2-21, 31-46, 52. As a consequence of Defendant's false and misleading marketing and omissions, it was able to capitalize on, and reap profits from, consumers who paid a premium for products that were not sold as advertised. ¶¶21, 28, 78.

At this stage in the litigation, the parties are engaged in the exchange of discovery in preparation for class certification. Declaration of Steven M. McKany in Support of Plaintiffs' Motion for Voluntary Dismissal without Prejudice and Without Notice as to Plaintiff Danz Doggie Daystrips ("McKany Decl."), at 2. Zeiger and his company, Danz, are each named plaintiffs in this action. *Id.*, ¶3. Plaintiff Zeiger is an individual, and plaintiff Danz is his dog daycare company. *Id.* Plaintiffs' claims are based on putative class members' direct purchases of Defendant's products. *Id.*, ¶4; *see also* ¶¶57-58. However, during the discovery process,

---

<sup>1</sup> Unless otherwise noted, all references to "¶\_\_" or "¶¶\_\_" are to Plaintiffs' Second Amended Class Action Complaint ("SAC"), filed on July 2, 2018 (ECF No. 95).

Defendant sought documents and information from plaintiff Danz that Plaintiffs strongly believe are inappropriate and threatened to needlessly harm or harass plaintiff Danz, such as seeking identification of plaintiff Danz's clients, which Plaintiffs believe are irrelevant to the claims at issue. McKany Decl., ¶5. Plaintiffs believe that the easiest way to resolve this discovery dispute is to voluntarily dismiss plaintiff Danz; Plaintiff Zeiger will continue as named plaintiff without any prejudice to the class. *Id.*, ¶6. Thus, on August 1, 2018, Plaintiffs' counsel reached out to Defendant's counsel to request that the parties stipulate to the voluntary dismissal of plaintiff Danz. *Id.*, ¶7. However, nearly three months later, on October 24, 2018, after Plaintiffs' counsel sent numerous (often ignored) follow-up e-mails, defense counsel informed Plaintiffs' counsel for the first time that they would not agree to the voluntarily dismiss plaintiff Danz, and would instead be proceeding with scheduling its deposition. *Id.*, ¶¶7-23. Hence, Plaintiffs have now brought the instant motion. McKany Decl., ¶24.

### ARGUMENT

Rule 41 provides that, after service of an answer and where stipulation cannot be obtained, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Dismissal rests in the court's sound discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982).

Dismissal of plaintiff Danz will not prejudice Defendant. This action concerns Plaintiffs and the putative class purchasing the products at issue based on Defendant's false and/or deceptive labeling, packaging, marketing, and advertising. Plaintiffs' claims are based on putative class members' direct purchases of Defendant's products. The dismissal of plaintiff Zieger's company, plaintiff Danz, is inconsequential, and Defendant can still seek information, and has, regarding plaintiff Zeiger's purchases of Defendant's products.

Dismissal of plaintiff Danz also will not prejudice the interests of other class members and the requirements of Rule 23(e) of the Federal Rules of Civil Procedure do not apply because (i) no class has been certified; (ii) this dismissal is without prejudice; and (iii) plaintiff Zeiger continues to serve as a putative class representative and named plaintiff and will continue the

duty toward absent class members. *See* McKany Decl., ¶¶2-3. Additionally, there has been no settlement or compromise and neither plaintiff Danz nor its counsel has received nor will receive any consideration from Defendant for the dismissal. *See* McKany Decl., ¶26.

#### CONCLUSION

For the foregoing reasons, Plaintiffs' motion to voluntarily dismiss plaintiff Danz should be granted.

Dated: October 25, 2018

ROBBINS ARROYO LLP  
BRIAN J. ROBBINS  
KEVIN A. SEELY  
ASHLEY R. RIFKIN  
STEVEN M. MCKANY

*/s/ Steven M. McKany*

---

STEVEN M. McKany

600 B Street, Suite 1900  
San Diego, CA 92101  
Telephone: (619) 525-3990  
Facsimile: (619) 525-3991  
E-mail: brobbins@robbinsarroyo.com  
kseely@robbinsarroyo.com  
arifkin@robbinsarroyo.com  
smckany@robbinsarroyo.com

LOCKRIDGE GRINDAL NAUEN P.L.L.P.  
ROBERT K. SHELQUIST  
REBECCA A. PETERSON  
100 Washington Avenue South, Suite 2200  
Minneapolis, MN 55401  
Telephone: (612) 339-6900  
Facsimile: (612) 339-0981  
E-mail: rkshelquist@locklaw.com  
rapeterson@locklaw.com

GUSTAFSON GLUEK, PLLC  
DANIEL E. GUSTAFSON (*Pro Hac Vice*)  
KARLA M. GLUEK (*Pro Hac Vice*)  
DANIEL J. NORDIN (*Pro Hac Vice*)  
Canadian Pacific Plaza  
120 South 6<sup>th</sup> Street, Suite 2600  
Minneapolis, MN 55402  
Telephone: (612) 333-8844  
Facsimile: (612) 339-6622  
E-mail: dgustafson@gustafsongluek.com  
kgluek@gustafsongluek.com  
dnordin@gustafsongluek.com

Attorneys for Plaintiffs

1284360

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2018, I authorized the electronic filing of the foregoing PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AND WITHOUT NOTICE AS TO PLAINTIFF DANZ DOGGIE DAYTRIPS; MEMORANDUM OF POINTS AND AUTHORITIES, and all attachments thereto, with the Clerk of Court of the United States District Court, Northern District of California by using the CM/ECF system, which will serve electronic notification of this filing to all counsel of record.

/s/ Steven M. McKany  
Steven M. McKany

# Mailing Information for a Case 3:17-cv-04056-WHO Zeiger et al v. WellPet LLC et al

## Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Raina Challeen Borrelli**  
rborrelli@gustafsongluek.com
- **Joan Alexis Rabutaso Camagong**  
jcamagong@shb.com,jabrooks@shb.com,cishihara@shb.com,rdarmstadt@shb.com,SFDistribution@shb.com
- **Susana Cruz Hodge**  
scrushodge@litedepalma.com,epalomino@litedepalma.com
- **Joseph J. DePalma**  
jdepalma@litedepalma.com,epalomino@litedepalma.com
- **Elizabeth Anne Fessler**  
efessler@shb.com
- **Daniel E. Gustafson**  
dgustafson@gustafsongluek.com
- **Charles J. LaDuca**  
charlesl@cuneolaw.com
- **Paul B. LaScala**  
plascala@shb.com,hkeresztes@shb.com
- **Steven M. McKany**  
smckany@robbinsarroyo.com,notice@robbinsarroyo.com,jsilverwood@robbinsarroyo.com
- **James P. Muehlberger**  
jmuehlberger@shb.com,lcaldwell@shb.com,SFdistribution@shb.com
- **Amir M. Nassihi**  
anassihi@shb.com,jabrooks@shb.com,tkeys@shb.com,rdarmstadt@shb.com,SFDistribution@shb.com
- **Rebecca Anne Peterson**  
rapeterson@locklaw.com,kjleroy@locklaw.com,bgilles@locklaw.com
- **Ashley Rawlins Rifkin**  
arifkin@robbinsarroyo.com,rsalazar@robbinsarroyo.com,notice@robbinsarroyo.com
- **Brian J. Robbins**  
notice@robbinsarroyo.com
- **William Roth Sampson , Mr**  
wsampson@shb.com,rdarmstadt@shb.com,jmoreno@shb.com
- **Kevin Andrew Seely**  
kseely@robbinsarroyo.com,notice@robbinsarroyo.com



- **Robert K. Shelquist**  
rkshelquist@locklaw.com, aaneewfield@locklaw.com, kjleroy@locklaw.com, brgilles@locklaw.com
- **Catherine Sung-Yun K. Smith**  
csmith@gustafsongluek.com
- **Katherine Van Dyck**  
kvandyck@cuneolaw.com

## Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

<b>Daniel</b>	<b>Jay Nordin</b>
Gustafson Gluek PLLC	
120 S. 6th St., Ste. 2600	
Minneapolis, MN 55402	